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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-136

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

vs.

DR. LUIS C. PRIETO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Insurance Company of North America, Petitioner, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on May 4, 1971 (the case was No. 20,799 in the Sixth Circuit).

OPINIONS BELOW

The opinion of the District Court for the Western District of Tennessee, Western Division, is not reported, nor is the *per curiam* opinion of the Sixth Circuit, but a copy of the opinions of each of those courts is appended to this petition, in the Appendix at pp. A1-A9, A12-A13.

JURISDICTION

The judgment of the Sixth Circuit was entered on May 4, 1971. (App. p. A10).

The jurisdiction of the District Court was invoked on the ground of diversity under 28 USC 1332 (a) (1).

The jurisdiction of this Court is invoked under 28 USC 1254 (1) and Rule 19 (1) (b) of this Court.

THE QUESTIONS PRESENTED

Did the District Court in dismissing plaintiff's action, and did the Sixth Circuit in affirming the dismissal, decide important questions of Tennessee law in a way in conflict with applicable Tennessee law and **public policy,** and in doing so violate the 10th Amendment to the federal constitution and the rule of *Erie* v. *Tompkins,* 304 U.S. 64?

Petitioner respectfully submits that the action of both courts below in failing to hold Dr. Prieto responsible to the hospital for indemnity or in the alternative for contribution, is in conflict with applicable Tennessee law in one or more of nine (9) different particulars; and each *subsidiary* question is summarized as follows:

(1) Is the courts' action in failing to give effect to Dr. Prieto's contractual responsibility which he expressly assumed by written contract with the hospital for the conduct of the pathology department, in conflict with the well-settled Tennessee principle which holds a party to a written contract ABSOLUTELY RESPONSIBLE to his contractee for the manner in which his non-delegable, contractual duty is performed by another (the technician Geiger) to whom he has entrusted its performance?

(2) Is the courts' action in holding Dr. Prieto to be the mere employee of the hospital, in conflict with the

well-settled Tennessee law and **public policy** that a corporation can neither practice medicine nor hire doctors to do so for it? If so, is the holding also in conflict with the Tennessee principle that where two constructions of a contract are possible, one illegal and one legal, the contract will be construed so as not to result in its illegality?

(3) Is the courts' action in failing to give effect to such contractual responsibility, in conflict with the well-settled Tennessee principle which requires that a written contract be construed in accordance with the undisputed proof and with the parties' mutually accordant construction, such undisputed proof and the parties' construction and the District Court's own findings of fact all being in accord that Dr. Prieto was "ultimately responsible" for injuries to a patient caused by negligent professional work done in his department and as to which he had the exclusive right of direction and control?

(4) Is the courts' action in failing to give effect to the contractual responsibility which Dr. Prieto expressly assumed by written contract with the hospital, in conflict with the well-settled Tennessee principles which (a) prohibit the courts from writing a different contract for the parties, (b) require that the terms of a contract be given their natural, popular meaning unless from the context it appears that the parties intended otherwise, and (c) require the courts to give the contract validity and effect, rather than render it illusory?

(5) Is the courts' action in holding the technician Geiger not to be the loaned servant of Dr. Prieto, on the ground that she was acting about the hospital's business as well as Dr. Prieto's, in conflict with the well-settled Tennessee principle that under the loaned servant doctrine, a loaned servant may be acting about the business of both her general and special employers without losing

the status of a loaned servant for whose negligence her special employer (Dr. Prieto here) is responsible?

(6) Is the courts' action in failing to hold the technician Geiger to be the loaned servant of Dr. Prieto, in the face of the undisputed proof and the District Court's own finding of fact that Dr. Prieto had the exclusive right of direction and control over the manner of the technician's performance of the cytology test (which caused the patient's injury), in conflict with the well-settled Tennessee principle that such right of control is the distinguishing mark of the master-servant relationship, other factors being looked to only as aids in determining whether and where such right of control exists in a given case?

(7) Is the courts' action in holding that Dr. Prieto was the mere employee of the hospital, in the face of the undisputed proof and the District Court's own finding of fact that the hospital had no right of direction or control over the manner of Dr. Prieto's performance of professional duty, in conflict with the well-settled Tennessee principle that such right of control is the distinguishing mark of the master-servant relationship and if it is absent then such relationship is absent also?

(8) Is the courts' action in holding Dr. Prieto not liable to *indemnify* the hospital for its derivative liability to a patient for injury caused by professional work for which Prieto was contractually responsible to the hospital, on the ground that Dr. Prieto was an employee of the hospital, in conflict with the well-settled Tennessee principle that a servant or employee is liable to indemnify his master for damage for which his master has been held derivatively liable?

(9) Is the courts' action in failing to hold Dr. Prieto liable to the hospital for *contribution*, in conflict with the

well-settled Tennessee principle that joint tortfeasors are liable for contribution on the equitable ground that where more than one tortfeasor is responsible for damage to a third party, one tortfeasor should not be left to bear the entire burden of liability?

STATEMENT

On March 27, 1964 a patient (Gault) in the hospital sustained serious personal injuries by the introduction by mistake of a sodium hydroxide solution into his stomach by a technician who confused the bottle with a bottle containing sodium chloride solution. Although both bottles were correctly labeled, they were identical in size, shape and color and were kept side by side on the same shelf in a cabinet in the department of pathology. Gault sued the hospital on the basis of the negligence of Dr. Prieto, the doctor in charge of the department, in storing the solutions and conducting the department under conditions conducive to use of the wrong solution, as well as the technician's negligence in using the wrong solution by mistake. The hospital's liability carrier paid the judgment of $162,500 plus interest and costs of defense and brought suit against Dr. Prieto and Geiger for indemnity and in the alternative for contribution. Judgment was entered against the technician by default, and the District Court dismissed the action as to Dr. Prieto, and the Sixth Circuit affirmed the dismissal on the ground that Dr. Prieto was an employee of the hospital.

* * *

On March 27, 1964 Dr. Prieto was under written contract (1961) (App. p. A14) with the Hospital by which he was appointed "Director of Laboratories and Pathologist in charge of the Department of Pathology and Clinical Laboratory" at the hospital. By that contract he expressly

assumed responsibility for the conduct and general management of the department and bound himself to "devote such time as is necessary to provide proper and adequate service, adequate service meaning that Pathologist will provide that degree of service and supervision which will meet the needs of the patient to the satisfaction of the medical staff."

It is also undisputed that under such 1961 contract the hospital looked to him for the direction and operation of the department; that he was "*ultimately responsible*" for the *maintenance of the chemicals* in the lab, for the *storage of the two bottles here involved*, for the *performance of the cytology test* which the technician Mrs. Geiger was performing when patient Gault was injured, and for *all the acts of his assistants* in the hospital doing his work; and *that he has never questioned that responsibility, even in this suit. Prieto admitted that the hospital administration's prerogatives with respect to his department were limited to administrative matters* such as setting the salary scale, length of vacation, etc.; and that he and his staff had to perform their professional duties "the way *we* see fit" and, "I practice as *I believe* is in the best interests of everybody", and *that the hospital had no right to control the manner of his performance of professional duties* and *no right to control the manner in which Mrs. Geiger performed her professional duties*; that the performance of the test was a professional duty; *and that the hospital had never attempted to interfere in such matters.* He *entrusted* and *delegated* to Mrs. Geiger the performances of those tests. If he had not had a technician to do them, he would have had to do them himself as the hospital depended on him to do, or have done, those tests. *The hospital* by the 1961 contract, *furnished Mrs. Geiger to Dr. Prieto.* He and his associate pathologist *selected* her and *accepted* her for

employment. Although the discharge of laboratory personnel is formalized by the personnel department, the *actual decision of discharge is Dr. Prieto's.* The technician was included under Dr. Prieto's malpractice liability policy of insurance as a professional employee under his supervision. Dr. Prieto's 1961 contract did *not* require him to devote *full* time to his work at the hospital and *allowed him to do work for other hospitals,* limited each party's right of termination, and required him to carry professional malpractice liability insurance. He negotiated his 1961 contract, thereby terminating an earlier contract which labeled him an "employee", in order to be ". . . more attuned to what my colleagues were doing. . . At the time they were proposing more of an independent contractor system. . .". He was *not* included under the hospital's workmen's compensation, retirement program, insurance program or pension plan but would have been so included if he had been considered an employee. No federal income tax was withheld from his compensation.

The District Court found as a fact that:

> ". . . the Hospital administration had no authority to control the manner in which he [Prieto] carried out strictly professional duties. . ." (App. p. A8) and,
>
> * * *
>
> "Dr. Prieto had ultimate responsibility for the professional work done in the department, including the work done by Mrs. Geiger as a cytologist. . ." (App. pp. A6-A7) and,
>
> * * *
>
> ". . . while it was not actually necessary for him to regularly supervise her in such work, he had the authority to do so." (App. p. A7)

Despite these three correct findings of fact by the District Court as to Dr. Prieto's ultimate responsibility, his

freedom from control over the manner of performance of his professional duty, and his exclusive right to direct and control Mrs. Geiger's performance of her professional duty, the District Court dismissed the action against Dr. Prieto on the basis that he was the mere employee or servant of the hospital and Mrs. Geiger was solely the employee of the hospital and not Dr. Prieto's loaned servant, and that Dr. Prieto himself was not negligent; and the Sixth Circuit affirmed on the sole basis of Dr. Prieto's status as an employee.

REASONS FOR GRANTING THE WRIT

(1) The courts' action below, in failing to give effect to Dr. Prieto's contractual responsibility which he expressly assumed by written contract with the hospital for the conduct of the pathology department, is in conflict with the well-settled Tennessee principle which holds a party to a written contract ABSOLUTELY RESPONSIBLE to his contractee for the manner in which his non-delegable *contractual* duty is performed by another to whom he had entrusted its performance.

Dickson v. *Blacker*, 194 Tenn. 504, 508, 253 S.W.2d 728, 730 (Sup. Ct. 1952).

Pullman Palace Car Co. v. *Gavin*, 93 Tenn. 53, 58, 23 S.W. 70, 71 (Sup. Ct. 1893).

Roths Central Garage v. *Holmes*, 10 Tenn. App. 500, cert. denied Sup. Ct. Tenn. (1930).

These cases hold that:

> "When by contract or statute the master is bound to do certain things, if he intrusts the performance of that duty to another, *he becomes absolutely responsible for the manner in which the duty is performed, precisely the same as though he himself had performed it*, and that without any reference to the question

whether the servant was authorized to do the particular act. Where the master, by contract or operation of law, is bound to do certain acts, he cannot excuse himself from liability upon the ground that he has committed that duty to another, and that he never authorized such person to do the particular act. Being bound to do the act, if he does it by another, he is treated as having done it himself, and the fact that his servant or agent acted contrary to his instructions, without his consent, or even fraudulently, will not excuse him." (*Dickson* v. *Blacker*, 194 Tenn. at 508, 253 S.W.2d at 730, emphasis supplied).

That this principle is here applicable is evident from the undisputed proof that the performance of the cytology tests were part of Dr. Prieto's contractual responsibility; that he entrusted it to the technician; and that *as the District Court itself found, "Dr. Prieto had ultimate responsibility for the professional work done in the department including the work done by Mrs. Geiger as cytologist . . ."* (App. pp. A6-A7); and, "It is true that as stated, *while it was not actually necessary for him to regularly supervise her in such work, he had the authority to do so . . ."* (App. p. A7); and, *". . . the Hospital administration had no authority to control the manner in which he carried out strictly professional duties. . ."* (App. p. A8). Prieto was bound by contract to perform, or see that someone under his direction and control performed, these tests. He entrusted that performance to Mrs. Geiger, and she did it negligently. Under Tennessee law Prieto is ". . . ABSOSOLUTELY RESPONSIBLE FOR THE MANNER IN WHICH THE DUTY IS PERFORMED, PRECISELY THE SAME AS THOUGH HE HIMSELF HAD PERFORMED IT. . ." This absolute duty is based on his written contractual obligation, and it is immaterial whether he was an employee of the hospital or was an independent contractor. Under Tennessee law even a mere servant may

be responsible to his principal for the torts of his sub-servant if he participated in the wrong, *L. & N. R.R. Co.* v. *Blair*, 63 Tenn. 407 (Sup. Ct. 1874), or if the sub-servant was under the ". . . ultimate control of the servant in the performance of the acts done for him. . ." *Doane Agricultural Service* v. *Coleman*, 254 F.2d 40, 45 (6th Cir. 1958), cert. denied, 358 U.S. 818 (1958). Here Prieto *participated* in the wrong in that he had contractually assumed responsibility to the hospital for every professional act done in his department; the technician was doing an act in his department which he otherwise would have had to do himself; she was using chemicals which he stored in a manner conducive to confusion, his compensation was increased by every test she performed; and she was under his ". . . ultimate control in the performance of the acts done for him. . .", and subject to his *exclusive* right of direction and control as to the manner in which she performed the test. Under the Tennessee law of contractual nondelegable duty, Prieto was absolutely liable to the hospital for the technician's negligence, and the courts below committed error in direct conflict with determinative Tennessee law.

(2) The courts' action below in construing Dr. Prieto's contractual relationship with the hospital to be that of an employee rather than an independent contractor, is in conflict with the well-settled Tennessee law and the **public policy** of Tennessee that a corporation may not legally practice medicine nor hire doctors to do so for it.

> *State ex rel. Loser* v. *National Optical Stores Co.*, 189 Tenn. 433, 444, 225 S.W.2d 263, 268 (Sup. Ct. 1949).

Such action is in further conflict with well-settled Tennessee law that where two (2) constructions of a written contract are possible, one in conformity with the law and the other illegal, the contract will be given the construc-

tion that will not result in violation of the law or public policy of the state.

Carolina Spruce Co. v. *Black Mountain R. Co.*, 139 Tenn. 137, 157, 201 S.W. 154, 159 (Sup. Ct. 1918).

Ramsey v. *United Mine Workers of America*, 265 F. Supp. 388 (E.D. Tenn. 1967) affirmed 416 F.2d 655, cert. granted 397 U.S. 1006 (1970).

See also *Great Northern R. Co.* v. *Delmar Co.*, 283 U.S. 686, 691 (1931).

In *State ex rel. Loser* v. *National Optical Stores, Inc.*, *supra*, it was said:

> "(2) Although, since the passage of the Acts of 1939 and 1947, a decision whether 'optometry' is a business or a profession, has not been required of us, it is well established by our cases that the word 'person' as it is used in our statutes and decisions which have to do with the eligibility to practice a profession, means *natural persons*, and does not include corporations. In the case of *Grocers' & Merchants' Bureau* v. *Gray*, 6 Tenn. Civ. App. 87, 92, in language particularly applicable here, it was said:
>
> > "'A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it *any more than it can practice medicine or dentistry by hiring doctors or dentists to act for it.*' (Emphasis supplied.) *In re Co-operative Law Co.*, 198 N.Y. 479, 484, 92 N.E. 15, 16, 32 L.R.A. N.S. 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879.
>
> "(3) This statement was substantially approved as to the profession of law in *State ex rel.* v. *Retail Credit Men's Ass'n*, 163 Tenn. 450, 43 S.W.2d 918, and in *Haverty Furniture Co.* v. *Foust*, 174 Tenn. 203, 124 S.W.2d 594. The rule is uniform that a corporation cannot practice one of the learned professions. 19 C.J.S., Corporations, Section 956, and obviously, this implies that the corporation cannot employ a licensed

practitioner, since a corporation acts only through agents, *Haverty Furn. Co.* v. *Foust, supra*, to practice for it. *State ex rel.* v. *Goldman Jewelry Co., supra; State ex rel.* v. *Retail Credit Men's Ass'n*, 163 Tenn. 450, 466, 43 S.W.2d 918 [189 Tenn. at 444-445, 225 S.W.2d 268, emphasis not supplied].

* * *

"The chancellor found, and we have affirmed his holding . . . that the contract of employment of the doctors was illegal and against public policy or public welfare.". (189 Tenn. at 447, 225 S.W.2d at 269).

Yet the District Court construed Dr. Prieto's contractual relationship with the hospital to be that of a mere employee, thus **construing the contract in a way that makes it contrary to the public policy of the state.** And the Sixth Circuit compounded the error by affirming the lower court specifically on the basis of "Dr. Prieto's status as an employee" (App. p. A13). Thus its decision is in clear and direct conflict with the law and public policy of the state of Tennessee.

The Tennessee Professional Corporation Act of 1970 did not affect the situation, nor has defendant or either court below claimed that it did. Such act would not apply to the hospital nor permit its employment of any physician to practice medicine for it; and in no event could such act, being effective only on and after February 18, 1970, retrospectively affect the relationships of these parties in 1964.

(3) The courts' action in failing to give effect to Dr. Prieto's contractual responsibility is further in conflict with the well-settled Tennessee principles that:

> a written contract will be construed in accordance with the parties' mutually accordant construction of the contract:

Canton Cotton Mills v. *Bowman Overall Co.*, 149 Tenn. 18, 29, 257 S.W. 398, 402 (Sup. Ct. 1923),

Fuller v. *McCallum & Robinson, Inc.*, 22 Tenn. App. 143, 165, 118 S.W.2d 1028, 1041, cert. denied (1938),

Tennessee Enamel Mfg. Co. v. *Stoves, Inc.*, 192 F.2d 863, 868 (6th Cir. 1951), cert. denied 342 U.S. 946 (1952),

and construed against the party who drew the agreement,

Hanover Ins. Co. v. *Haney*, 221 Tenn. 148, 153, 425 S.W.2d 590, 592 (Sup. Ct. 1967),

American Indemnity Co. v. *Sears, Roebuck & Co.*, 195 F.2d 353, 355 (6th Cir. 1952).

Here, Dr. Prieto's testimony in this cause and his 1961 contract show that he assumed by that contract responsibility for the conduct of the department; and his testimony is that he construed the contract to mean that he was *ultimately responsible* for all of the professional work done in the department including Mrs. Geiger's work. Indeed, *the District Court made that exact finding of fact* (App. pp. A6-A7). Moreover, his attorney drew the contract. The District Court's failure to give effect to that ultimate responsibility is in direct conflict with the Tennessee law as enunciated by the foregoing authorities.

(4) The courts' failure to give effect to Dr. Prieto's contractual assumption of responsibility is in conflict with the well-settled Tennessee principles that:

(a) The court is without power to make a new and different contract for the parties.

Dubois v. *Gentry*, 182 Tenn. 103, 108, 184 S.W.2d 369, 371 (Sup. Ct. 1945)

Central Drug Store v. *Adams*, 184 Tenn. 541, 549, 201 S.W.2d 682, 686 (Sup. Ct. 1947).

(b) The terms of a contract are to be given their natural, popular meaning unless from the context it appears that the parties intended otherwise.

Rolane Sportswear, Inc. v. *United States Fidelity & Guaranty Co.*, 407 F.2d 1091, 1097 (6th Cir. 1969)

(c) It is the duty of the court to construe written contracts so as to give them effect rather than render them illusory

Rawlings v. *New Memphis Gaslight Co.*, 105 Tenn. 268, 280, 60 S.W. 206, 209 (Sup. Ct. 1900).

See also: *Cordovan Associates, Inc.* v. *Dayton Rubber Co.*, 290 F.2d 858, 861 (6th Cir. 1961).

The courts' violation of these principles is even more grievous in view of the District Court's correct finding of fact that Prieto did indeed have ". . . the ultimate responsibility for the professional work done in the department by Mrs. Geiger as a cytologist. . ." (App. pp. A6-A7). In the face of its own finding the District Court failed to give effect to that responsibility. It rendered that contractual provision, as well as its own finding, illusory; and the effect of both courts' action is that they wrote for the parties a new contract omitting Dr. Prieto's express assumption of responsibility for the conduct of his department including Mrs. Geiger's acts.

(5) The courts' action in holding the technician not to be the loaned servant of Dr. Prieto, on the ground that she was acting about the hospital's business as well as that of Dr. Prieto, is in conflict with the well-settled Tennessee principle that under the loaned servant doctrine in Tennessee a servant may be acting about the business of *both*, her general and special employers, without losing her status of loaned servant.

In *Gaston* v. *Sharp*, 179 Tenn. 609, 613-614, 168 S.W.2d 784, 785-786 (1943), the Tennessee Supreme Court said:

> "Neither the test stated in *Chamberlain* v. *Lee* nor that stated in *Owen* v. *St. Louis Spring Co.* has proven entirely adequate. Instead of being tests they are rather to be considered as factors in reaching a conclusion as to where the responsibility lies for the servant's act. This is true because a servant at a particular time may remain under the control of his general employer for some purposes and yet be under the control of a special employer for others. Likewise it *sometimes happens that a particular work in which the servant is engaged may be properly considered as the work or business of both the general employer and the special employer.*" (179 Tenn. at 613 and 168 S.W.2d at 785-786, emphasis supplied).

So, even though the technician may have been acting about the hospital's business as well as Dr. Prieto's, this would not mean that she was not Prieto's loaned servant.

As said in *Gaston* v. *Sharp, supra,* the question of which employer is responsible for the loaned servant's negligence depends on which employer has the right to control the servant *as to the particular act involved*:

> "The question is as to whether it is understood between him and his employers that he is to remain in the allegiance of the first as to a specific act, or is to be employed in the business of and subject to the direction of the temporary employer *as to the details of such act.* This is a question of fact in each case." (179 Tenn. at 614 and 168 S.W.2d at 786, emphasis supplied).

The Sixth Circuit said the same thing in *Doane Agricultural Service* v. *Coleman, supra*:

> "in every case the *decisive question* is, had the defendant *the right of control, in the given particular,* the conduct of the person doing the wrong." (254 F.2d at 43, emphasis supplied).

In *this* case this question of fact was resolved by the District Court's own finding that:

"It is true, as stated, while it was not actually necessary for him [Dr. Prieto] to regularly supervise her [Mrs. Geiger] in such work, *he had the authority to do so.*" (App. p. A7, emphasis supplied).

The courts below should have held Mrs. Geiger to be the loaned servant of Dr. Prieto for whose negligence he was responsible to the hospital, not only on the ground of his contractual assumption of responsibility, but also because *it was he* (not the hospital) *who had the exclusive right of control over the manner and method of her performance of professional duty.* In failing to so hold the lower courts' actions are in direct conflict with Tennessee law.

(6) The courts' action in failing to hold the technician to be the loaned servant of Dr. Prieto, is further in conflict with the Tennessee law that *the distinguishing mark of the master-servant relationship is the right of control over the manner of performance of the act which caused the injury,* other factors being looked to only as aids in determining whether and where such right of control exists in a given case.

D. M. Rose & Co. v. *Snyder*, 185 Tenn. 499, 514, 206 S.W.2d 897, 904 (Sup. Ct. 1947).

Conasauga River Lumber Co. v. *Wade*, 221 F.2d 312 315 (6th Cir. 1955), cert. denied 350 U.S. 949 (1956).

"The law of Tennessee, which is applicable to the present contract, does not differ materially from general law. In D. M. Rose & Co. v. Snyder, 185 Tenn. 499, 514, 206 S.W.2d 897, 904, it is said: 'This right of control is the distinguishing mark which differentiates the relation of master and servant from that of employer and independent contractor. Other factors are looked to only to aid in determining whether such right existed in a given case. * * * Wherever the defendant has had such right of control, irrespective of

whether he exercised it or not, he has been held to be the responsible principal or master'." (221 F.2d at 315).

The *undisputed proof* and the *District Court's own finding* was that *Dr. Prieto had such right of control over the work of Mrs. Geiger.* Yet the District Court inconsistently held Dr. Prieto *not* responsible for her negligence, and the Sixth Circuit in what seems to us to be an inadequately considered *per curiam* opinion, compounded the error.

(7) The courts' action in holding Dr. Prieto to be the mere employee (servant) of the hospital, in the face of the undisputed proof and the District Court's own finding that the hospital had no right of control over the manner in which Dr. Prieto carried out professional duties, is in conflict with the well-settled Tennessee principle that such right of control is the distinguishing mark of the master-servant relationship as opposed to the relationship of independent contractor and contractee.

D. M. Rose & Co. v. *Snyder, supra.*

Conasauga River Lumber Co. v. *Wade, supra,* and *Doane Agricultural Service* v. *Coleman, supra,* are applicable here also. As stated in *D. M. Rose & Co.* v. *Snyder, supra*:

> "In leading case of *Powell* v. [*Virginia*] *Construction Co.*, 88 Tenn. 692, 697, 13 S.W. 691, 692 [17 Am. St. Rep. 925], Judge Lurton gave perhaps the best, and the now generally accepted, definition of an independent contractor in these words:
>
> 'An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to control of his employer, except as to the result of his work.' " (185 Tenn. at 513, 206 S.W.2d 903).

In *Conasauga River Lumber Co.* v. *Wade, supra,* the Sixth Circuit's then Chief Judge Simons said:

> "The classical primary test as to whether a contractor is independent or a mere servant depends upon *his right to control the manner and method in which the work he has undertaken to perform is carried on, independent of supervision and direction by his employer.*" (221 F.2d 315, emphasis supplied).

The District Court correctly found that:

> ". . . the Hospital administration had no authority to control the manner in which he carried out strictly professional duties. . . ." (App. p. A7).

Yet that court held Dr. Prieto a mere servant of the hospital and the Sixth Circuit affirmed on that specific ground, saying that:

> "Considering Judge Brown's finding that Dr. Prieto was an employee of the hospital, and it being unnecessary to pass on the issue whether he was an independent contractor, the judgment is affirmed on Judge Brown's opinion, based on Dr. Prieto's status as an employee." (App. p. A13).

We respectfully submit that these actions are in direct and irreconcilable conflict with the Tennessee law as enunciated by the Supreme Court of Tennessee and the prior decisions of the Sixth Circuit in *Doane, supra* and *Conasauga, supra.*

(8) The courts' action in holding Dr. Prieto not liable to *indemnify* the hospital for its derivative liability to a patient for injury caused by professional work for which Prieto was contractually responsible, on the ground that Dr. Prieto was an employee of the hospital, is in conflict with the well established Tennessee principle that a servant or employee is liable to indemnify his master for

damages for which his master has been held derivatively liable.

Stewart v. *Craig*, 208 Tenn. 212, 344 S.W.2d 761 (Sup. Ct. 1961).

Williford v. *Kansas City M. & B.R. Co.*, 154 Fed. 514 (W.D. Tenn. 1907).

If Dr. Prieto was himself negligent (and the undisputed proof including his own testimony shows him to be) in permitting a lax manner of storing the two solutions, one perfectly harmless, the other a deadly poison, in identical bottles on the same shelf in the same cabinet, where a technician could foreseeably confuse their identity, then he is liable to indemnify the hospital under Tennessee law, *regardless of whether he was only an employee* of the hospital. As stated in *Stewart* v. *Craig, supra,*

> "[1] The rule of law in this State, and universally so far as we know, that where the master (defendants in this case) is held liable for negligent acts of his servant (covenantee) solely upon the doctrine of *respondeat superior,* the master in turn has a cause of action against the servant for any such amount for which he is held liable. *Maxwell* v. *Louisville & N. R. Co.*, 1 Tenn. Ch. 8; *Carter* v. *E. T. & W. N. Transp. Co.*, 35 Tenn. App. 196, 243 S.W.2d 505; *Williford* v. *Kansas City M. & B. R. Co.*, C.C., 154 F. 514; 42 C.J.S., Indemnity, sec. 21, p. 597." (208 Tenn. at 216, 344 S.W.2d at 762-763, emphasis not supplied).

(9) The courts' action in failing to hold Dr. Prieto liable to the hospital for *contribution* is in conflict with the well established Tennessee principle that *joint tortfeasors are liable for contribution* on the equitable ground that where more than one tortfeasor is responsible for damages to a third party, one tortfeasor should not be left to bear the entire burden of liability. Even if the hospital alone is held liable for the technician's tort, Dr. Prieto is liable

for his own negligence, and is liable to the hospital (here, its subrogee, insurer) for contribution.

> *Huggins* v. *Graves*, 210 F. Supp. 98 (E.D. Tenn. 1962), affirmed 337 F.2d 486 (6th Cir. 1964).
>
> "A few states followed a minority view and held that there might be contribution at common law between joint tortfeasors who were merely negligent. Tennessee is one of these states, reaching a forthright and commendable result in the case of Davis v. Broad Street Garage." (210 F. Supp. at 103).

That Dr. Prieto was himself negligent is shown by the undisputed proof that he permitted the two solutions to be kept in bottles identical in size, shape and color in the same cabinet and on the same shelf, where Mrs. Geiger, a technician in her 8th month of pregnancy, could foreseeably mistake one for the other; and Dr. Prieto by his own testimony recognized the specific danger that one of his technicians might pick up and use the wrong bottle without reading the label or otherwise discovering the error, yet he took no measures to guard against or minimize this risk other than labeling each bottle. He neither made nor enforced any rules with regard to the use of the dangerous sodium hydroxide solution; he had no rule against its storage in the same cabinet with or in a bottle identical to that which contained the sodium chloride solution routinely used internally; he did not require his technician to keep her supply of sodium chloride in her cytology lab where it could not be confused with the sodium hydroxide in the chemistry lab; he had no rule against his technician replenishing her supply of sodium chloride from the supply in the chemistry lab where it was kept in the same cabinet with the deadly sodium hydroxide; and he failed to supervise or instruct Mrs. Geiger in the use of the chemicals, although he had the right and duty to do so. As a result, his

negligent practices created a trap for the unwary which proximately contributed to causing permanent injury to patient Gault, for which the hospital was held derivatively liable in the sum of $162,500. The District Court was in error in concluding that Dr. Prieto was not negligent. Its error was not merely one of fact but one of law or at best of mixed fact and law as it erroneously considered that plaintiff could not make a case of negligence without expert proof of Prieto's violation of custom. This was error because under Tennessee law evidence of custom is not necessary when the trier of fact may resolve the issue of negligence using ordinary lay knowledge and experience.

> *Rural Education Association* v. *Bush*, 34 Tenn. App. 34, 47, 298 S.W.2d 761, 768 (1956), cert. denied (Sup. Ct. 1957).

It was also error because the Sixth Circuit in reviewing the judgment in the patient's case held in effect that Dr. Prieto's storage practices constituted negligence.

> *Gault* v. *Poor Sisters of St. Francis*, 375 F.2d 539, 540 (6 Cir. 1967).

In the instant case, the Sixth Circuit pretermitted the question of Dr. Prieto's negligence, apparently believing that an affirmance of the dismissal on the sole ground that Dr. Prieto was an employee of the hospital was sufficient to completely decide the case. Such is not true however, and as matters now stand the issues of Dr. Prieto's negligence and plaintiff's right to contribution, stand unreviewed by the Court of Appeals.

(10) By deciding the case in a way that is in direct and irreconcilable conflict with Tennessee law and public policy, the courts below have violated the mandate of *Erie*

v. *Tompkins*, supra and the Tenth Amendment to the federal constitution. They have ignored well-established substantive Tennessee law governing non-delegable contractual duty, the construction of written contracts, the master-servant relationship, the loaned servant doctrine, indemnity, and contribution, and the stated public policy of the State. In doing so, the lower courts have, in the words of this Court in *Erie*, ". . . invaded rights which in our opinion are reserved by the Constitution to the several States." (304 U.S. 80).

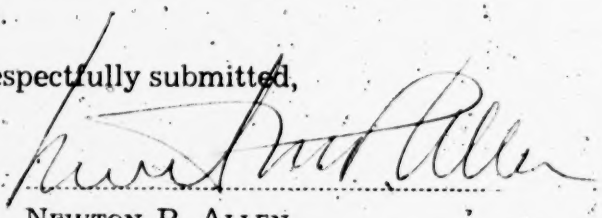
CONCLUSION

For one, more, or all, of the ten (10) foregoing reasons, this petition for a Writ of Certiorari should be granted.

The District Court and Court of Appeals have acted in direct and irreconcilable conflict with the well-settled substantive law of Tennessee in nine (9) specific particulars including the stated public policy of the state of Tennessee; and in so acting, they have invaded rights which are reserved by the 10th Amendment to the Constitution to the several States. *Erie* v. *Tompkins*, supra.

We are aware that this Court tends to be inundated by criminal and "civil rights" cases. But we respectfully hope that the Court will not permit this state of affairs to deprive other citizens of their rights under state law and the federal constitution.

Respectfully submitted,



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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

INSURANCE COMPANY OF NORTH AMERICA,
Plaintiff,
vs.
DR. LUIS C. PRIETO,
Defendant.
No. C-67-333

MEMORANDUM DECISION

(Filed July 13, 1970)

Plaintiff, Insurance Company of North America, brought this subrogation action seeking indemnity with respect to the judgment, interest, court costs and expense of defense paid by it in behalf of its insured in the case of *Gault v. Poor Sisters of St. Francis etc.* In that action Gault obtained in this court a jury verdict and judgment against the defendant in that case (doing business in Memphis as St. Joseph Hospital) in the amount of $162,500, which was affirmed on appeal. 375 F.2d 539 (6th Cir. 1967). The defendants in this diversity case now before us are Mary Geiger, against whom a default has been entered, and Dr. Luis Prieto. A trial has been had, without a jury, with respect to the liability of Dr. Prieto.

While it is conceded that the liability of Dr. Prieto for indemnity must be determined solely from the evidence introduced in this case, we believe it would be well by way of background to outline the proceedings in the prior case.

Gault brought an action against plaintiff's insured, St. Joseph Hospital, in which he alleged that he had received a serious injury while he was a patient in the Hospital on March 27, 1964 when a cytology technician, Mary Geiger, introduced a solution of sodium hydroxide (a strong caustic) into his stomach by mistake. He alleged, generally, that Mrs. Geiger was guilty of negligence in administering to him a solution of sodium hydroxide rather than a solution of sodium chloride (a saline solution composed of table salt and water), and that Dr. Prieto, as director of the Hospital's department of pathology and clinical laboratories, was also guilty of negligence in allowing solutions of sodium hydroxide and sodium chloride to be stored side by side in bottles of the same size and color, in failing to maintain a supply of sodium chloride solution in the cytology laboratory, and in failing to instruct Mrs. Geiger and to promulgate and enforce rules with respect to the handling of dangerous chemicals such as sodium hydroxide. Gault further alleged that the Hospital was liable to him as a result of their negligence because Mary Geiger was an actual or ostensible employee of the Hospital or was an employee of Dr. Prieto who in turn was an employee of the Hospital and that Dr. Prieto was an actual or ostensible employee of the Hospital. All of the aforesaid theories of negligence and theories of legal responsibility of the Hospital for such negligence were submitted to the jury, and a general verdict was rendered in favor of Gault against the Hospital. It is, of course, impossible now to determine on which theory or theories the jury found that there was negligence and found that the Hospital was liable therefor, and, as stated, the parties to the instant action agree that the liability of Dr. Prieto to indemnify plaintiff here must be determined only by the evidence introduced herein.

In this indemnity action, plaintiff contends that Mrs. Geiger and Dr. Prieto were negligent in the same particulars as were alleged by Gault in the personal injury action. It is plaintiff's contention, moreover, that it is entitled to be indemnified by Dr. Prieto since the Hospital's liability to Gault was only a vicarious liability and since (1) such liability was imposed as a result of the negligence of Dr. Prieto or (2) such liability was imposed as a result of the negligence of Mrs. Geiger and for whose negligence Dr. Prieto is liable. With respect to the contention that Dr. Prieto is liable to fully indemnify the Hospital because of his own negligence, plaintiff contends that such is true even though Mrs. Geiger was also negligent and even if she was an employee[1] of the Hospital. With respect to the contention that Dr. Prieto is liable for the negligence of Mrs. Geiger, plaintiff contends that she was his employee and that he is required to indemnify the Hospital for her negligence whether he was also an employee of the Hospital or was an independent contractor. Dr. Prieto contends, on the contrary, that Mrs. Geiger alone was guilty of negligence and that she was the employee only of the Hospital.

Plaintiff introduced no proof that Dr. Prieto's conduct and prescribed procedure with respect to the handling and storage of sodium hydroxide was any different from that of other hospitals. On the contrary, the proof, to the extent that there is proof, indicates that there was no such difference, because Dr. Prieto testified that he knew of no hospital which handled the problem differently. Instead, plaintiff, in support of its contention that Dr. Prieto was negligent, argues that common sense appraisal of the facts will lead to the conclusion that he was negligent.

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1. In this memorandum, we use the word "employee" as meaning the same as "servant."

Mrs. Geiger, who had received training and certificate as a cytologist from the University of Tennessee Medical Units, had been employed as such in the cytology laboratory (which is part of the clinical laboratories) of the Hospital for about nine months at the time of this accident. Gault, who was a patient in the Hospital, was sent to the laboratory for a cytology test. This test involves the introduction of a weak saline solution (so weak that one can hardly taste the salt) into the patient's stomach by means of a tube, after which the solution is aspirated and examined by a pathologist for cancer cells. Mrs. Geiger usually had the necessary saline solution on hand in the cytology laboratory, but on the morning of Gault's test she had none. She could procure such solution by mixing it herself, by ordering it from the Hospital pharmacy, or by obtaining it from the chemistry (actually the biochemistry) laboratory, which is likewise a part of the clinical laboratories. She chose to obtain the saline solution from the chemistry laboratory, which was across and down the hall a few feet away from the cytology laboratory. It appears that in the chemistry laboratory a bottle of sodium hydroxide solution and a bottle of sodium chloride solution were stored together, and the bottles were of the same size and color. However, it also appears that each was labeled correctly and that Mrs. Geiger simply failed to read the label when she mistakenly procured the solution from the sodium hydroxide bottle. The sodium hydroxide bottle was labeled "SODIUM HYDROXIDE 10%" while the other bottle was labeled "Sodium Chloride 0.85%."

It appears that in the clinical laboratories there were many bottles containing solutions that were highly toxic if administered internally, which fact Mrs. Geiger and the other employees there well knew. It also appears that Mrs. Geiger knew of the dangerous property of sodium hydrox-

ide in particular, and she knew that the only proper and safe way to prevent an accident was to read the label on a bottle before she made use of its contents. We cannot say, therefore, that Dr. Prieto reasonably should have anticipated that a trained and experienced cytologist such as Mrs. Geiger would negligently fail to read a label on a bottle before introducing the contents thereof into a patient's stomach. Accordingly, we cannot say that Dr. Prieto was guilty of negligence with respect to the manner in which these two chemicals were stored in the chemical laboratory[2], nor can we say that he was guilty of negligence in not having a sufficient amount of saline solution stored in the cytology laboratory, nor can we say that he was guilty of negligence in failing to promulgate rules or to particularly instruct Mrs. Geiger with respect to the handling of toxic chemicals.[3]

Having determined that Dr. Prieto was not negligent, we now consider the question whether he is liable to indemnify the Hospital for Mrs. Geiger's negligence.

It appears that, under his contract as director of the department of pathology and clinical laboratories of the

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2. Plaintiff places great reliance on the statement in the opinion of the Court of Appeals in the *Gault* case to the effect that the accident would not have happened but for the manner of storage of the two solutions. This statement, of course, is in no way an adjudication so far as the instant case is concerned. More importantly, it is no more than a statement that the manner of storage of the chemicals was one of the causes in fact of the accident; it is not a statement that the manner of storage constituted a departure from due care.

3. Since we determine that Dr. Prieto was not negligent, we need not consider his alternative contention; this contention is that even if he was negligent, such negligence was not a proximate cause of the accident because of the intervening negligence of Mrs. Geiger in not reading the label on the bottle. Cf. *Moody* v. *Gulf Refining Co.*, 142 Tenn. 280 (1919).

Hospital, Dr. Prieto received as compensation, which he divided with his associate pathologist Dr. Martha Goss, an amount equal to 13 1/2% of the gross billings to patients by the Hospital for services rendered by his department. Equipment and supplies were furnished by the Hospital on request of the department, and Dr. Prieto paid no part of the expenses of operating the department. He had, however, the overall responsibility for the operation of the department. This included the responsibility of recommending the hiring and firing of employees in the department, and recommending the amount of salaries of such employees within fixed limits, which recommendations the Hospital personnel office almost always accepted.

Mrs. Geiger was employed and her salary was determined in the manner indicated above, and the Hospital paid her salary and determined the length of her vacations. The Hospital deducted from her salary for Federal income tax and Social Security, and it treated her as an employee for workmen's compensation and all other purposes. Mrs. Geiger, Dr. Prieto and the Hospital administrators considered her to be a Hospital employee and not an employee of Dr. Prieto.[4] She worked only on the Hospital premises and used only its equipment and supplies. The cytology department was operated as part of the regular business of the Hospital for which services it charged and collected from patients.

While Dr. Prieto had ultimate responsibility for the professional work done in the department, including the

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4. It appears that, with respect to malpractice insurance, Dr. Prieto's premium was based in part on the number of persons he supervised, and he (not they) was covered with respect to their negligence. However, it further appears that this coverage was obtained not because these supervised persons were considered to be his employees but rather because, as in the instant case, it might be claimed that they were his employees.

work done by Mrs. Geiger as a cytologist, it appears that, since she was trained in her profession when she came to the Hospital, it was not as a practical matter necessary for him or his associate pathologist actually to supervise her work. Further, it appears that, with respect to safety practices in the storage and use of chemicals, the Hospital had not completely delegated responsibility to Dr. Prieto, for the associate administrator testified that the Hospital administration would itself stop any practice that appeared to it to be unsafe. Accordingly, we find that Mrs. Geiger was generally the employee of the Hospital and not of Dr. Prieto. Restatement, Agency (2d), § 220.

But, argues plaintiff, even if Mrs. Geiger was generally the employee of the Hospital, she was the loaned employee of Dr. Prieto, who was an independent contractor, while she was performing her work as a cytologist. We will assume for the moment that Dr. Prieto was an independent contractor. It is true that, as stated, while it was not actually necessary for him to regularly supervise her in such work, he had the authority to do so. It is also true, however, that if Mrs. Geiger was a loaned employee while performing such work, she was permanently loaned since that was the only work that she did. Thus we do not have the situation, such as in *Gaston* v. *Sharpe*, 179 Tenn. 609 (1943), wherein a general employee of one employer temporarily does the work of another employer. Here Mrs. Geiger, in her work in the Hospital's department of pathology and clinical laboratories, was still doing the work of the Hospital, her general employer.

An additional reason why we could not find Mrs. Geiger to have been a loaned employee is that Dr. Prieto was not an independent contractor but rather was also an employee of the Hospital. The Hospital deducted from Dr. Prieto's compensation for Federal income tax and

Social Security and contributed an employer's share with respect to Social Security tax. The Hospital furnished all supplies and equipment and place of work for Dr. Prieto. He had been so employed by the Hospital since 1956. While it appears that he was allowed to and did examine some tissue specimens that were sent in by another hospital (for which he and the Hospital evenly divided the fees), with this exception all of his work was done for patients in this Hospital. Dr. Prieto considered himself to be the Hospital's employee and the associate administrator admitted that he was a "contractual employee." Although at the time of the accident he was employed pursuant to a written contract of October, 1961, he initially worked under substantially similar conditions without a written contract. While the Hospital administration had no authority to control the manner in which he carried out strictly professional duties, this absence of the right to control such activities does not necessarily remove Dr. Prieto from the category of an employee. Restatement, Agency (2), § 220, Comment on Subsection (1), d. Plaintiff contends that Dr. Prieto could not legally and ethically perform such professional work as an employee of the Hospital. The contract of employment executed in 1961 does look as if it might well have been drawn by his lawyer in such a way as to give Dr. Prieto the aura of professionalism to obviate criticism, but he remained, as he had been, in the actual employ of the Hospital.

Plaintiff contends that, even if Dr. Prieto was an employee of the Hospital, he would nevertheless be liable to indemnify it for the negligence of Mrs. Geiger for the reason that an agent must indemnify his principal for the negligence of his subagent. In the first place, we have, as has been seen, determined Mrs. Geiger to have been an employee only of the Hospital. Secondly, even if she were

Dr. Prieto's employee, we agree with the following statement from 35 Am. Jur., Master and Servant, § 103:

> "Misconduct on Part of Subagent or Assistant.—For the fault or misconduct of a subagent or assistant, an agent is not responsible where, in the course and from the nature of the business, it becomes necessary to employ subagents, by reason of their particular profession or skill, or where the appointment of a subagent has been authorized, the agent having used reasonable diligence and skill in his choice of the subagent. There is, in such a case, a privity between the subagent and the principal; and the latter must therefore seek a remedy directly against the subagent for his negligence or misconduct."

We therefore find and conclude that plaintiff is not entitled to indemnity from Dr. Prieto.

A judgment will be prepared for entry.

ENTER this 13 day of July, 1970.

/s/ Bailey Brown
Chief Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

INSURANCE COMPANY OF NORTH AMERICA,
Plaintiff,
vs.
DR. LUIS C. PRIETO,
Defendant.
No. C-67-333

FINAL JUDGMENT

(Filed July 24, 1970)

This action came on for trial before the court, the Honorable Bailey Brown, District Judge, presiding, without the intervention of a jury, and the issues having been duly tried and a decision having been duly rendered as set out in the Memorandum Decision filed herein on July 13, 1970, which is incorporated in this Judgment by reference; and a Default having been theretofore duly entered as to defendant Mary Geiger.

IT IS ORDERED AND ADJUDGED that the plaintiff, Insurance Company of North America, recover of defendant Mary Geiger the sum of $200,743.47 (consisting of the amount of the judgment of $162,500.00 paid by plaintiff herein, Insurance Company of North America, in Civil Action No. 5329 styled Larry Gault vs. Poor Sisters of St. Francis, etc.; the sum of $17,737 interest paid by plaintiff herein on said judgment in the said Gault action; court costs in the sum of $1,974.80 in said action, paid by plaintiff herein; the sum of $12,009.69 and the sum of $6,521.98

being the attorney's fee and other expenses of defense paid by plaintiff herein in the defense of the Gault action) and costs of this cause.

IT IS FURTHER ORDERED AND ADJUDGED that the action be dismissed on its merits as to the defendant Luis C. Prieto and that said defendant recover his costs from the plaintiff.

This 24 day of July, 1970.

/s/ Bailey Brown
Chief Judge

Approved as to Form:

/s/ Newton P. Allen
Attorney for Plaintiff

/s/ Cooper Turner
Attorney for Defendant
Dr. Luis C. Prieto

No. 20799

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INSURANCE COMPANY OF NORTH AMERICA, *Plaintiff-Appellant*, v. DR. LUIS C. PRIETO, *Defendant-Appellee*.	ON APPEAL from the United States District Court for the Western District of Tennessee, Western Division.

Decided and Filed May 4, 1971.

Before: PHILLIPS, Chief Judge, PECK, Circuit Judge, and MCALLISTER, Senior Circuit Judge.

PER CURIAM. Larry Gault, not a party to this case, recovered a judgment of $162,500 against a hospital for personal injuries suffered by him while he was a patient therein. The judgment was affirmed by this Court. *Gault v. Poor Sisters of St. Francis Seraph of Perp. Ador.*, 375 F.2d 539. Having satisfied the judgment, plaintiff-appellant, the insurer of the hospital, brought this action seeking indemnity from Dr. Luis C. Prieto, the director of the hospital's pathology department, wherein the accident occurred. The District Court, sitting without a jury, entered a judgment dismissing the action; and the insurer appeals.

In our determination on appeal, it appears that the immediate cause of Gault's injury was the introduction into his system of sodium hydroxide instead of sodium chloride

by a technician who used the wrong bottle. Sodium hydroxide and sodium chloride were clearly marked by labels, but were in identical bottles, placed side by side on the same shelf. Plaintiff-appellant contends that Dr. Prieto was an independent contractor rather than an employee of the hospital; that he was, himself, negligent in permitting a lax manner of storage of a poison; and that the technician was an employee of Dr. Prieto, rather than of the hospital.

Judge Bailey Brown, in a carefully written Memorandum, resolved all of these issues adversely to appellant. In his Memorandum, Judge Brown, in answer to the contentions of appellant that Dr. Prieto was an independent contractor, and the technician was his loaned employee, even if she was generally the employee of the hospital, stated that assuming "for the moment that Dr. Prieto was an independent contractor," nevertheless, the technician in her work in the hospital's department of pathology and clinical laboratories, was still doing the work of the hospital, her general employer, rather than as the loaned employee of Dr. Prieto.

However, Judge Brown went on to state in his Memorandum: "An additional reason why we could not find [the technician] to have been a loaned employee is that Dr. Prieto was not an independent contractor but rather was also an employee of the Hospital."

Considering Judge Brown's finding that Dr. Prieto was an employee of the hospital, and it being unnecessary to pass on the issue whether he was an independent contractor, the judgment is affirmed on Judge Brown's opinion, based on Dr. Prieto's status as an employee.

AGREEMENT

THIS AGREEMENT, made and entered into by and between St. Joseph Hospital, an Institution affiliated with the Poor Sisters of St. Francis Seraph of Perpetual Adoration, In., a Tennessee non-profit corporation, party of the first part, hereinafter called HOSPITAL, and DR. LUIS C. PRIETO, party of the second part, hereinafter called PATHOLOGIST, both of Memphis, Tennessee:

WHEREAS, HOSPITAL has offered to PATHOLOGIST an appointment to the position with HOSPITAL as Director of Laboratories and Pathologist in charge of its Department of Pathology and Clinical Laboratory, hereinafter called The Department; and,

WHEREAS, said appointment is made on the recommendation of the Medical Staff and has been confirmed by the governing board of HOSPITAL, AND nomination of PATHOLOGIST for this appointment has been made in accordance with the procedure followed in the selection of all other physicians practicing in HOSPITAL; and,

WHEREAS, PATHOLOGIST desires to accept said appointment.

NOW, THEREFORE, in consideration of the mutual promises made each to the other, the parties agree as follows:

1. HOSPITAL will provide fully and adequately for the proper functioning of The Department.

2. PATHOLOGIST assumes the responsibility for the conduct and general management of The Department, and will devote such time thereto as is necessary to provide proper and adequate service, adequate service meaning that PATHOLOGIST will provide that degree of service

and supervision which will meet the needs of the patient to the satisfaction of the Medical Staff.

3. It is understood that PATHOLOGIST, with the aid of an Associate, presently conducts The Department, and that PATHOLOGIST may engage such assistant pathologists as are required for the proper functioning of the laboratory, same to be approved by the Administrator and Medical Staff, compensation for said Assistant to be the liability of PATHOLOGIST.

4. PATHOLOGIST, his Associate and/or assistant pathologist will carry professional liability and such other forms of insurance as applicable to the circumstances and in conformity with local custom and law at their individual expense.

5. PATHOLOGIST WILL PROVIDE FOR CONTINUATION OF PROFESSIONAL service during absences owing to illness, vacation and attendance at scientific meetings and Hospital and Medical Staff will be notified of same. There shall be no decrease of suspension of compensation due PATHOLOGIST, his Associate and/or Assistant by reason of absence for any reasonable cause.

6. PATHOLOGIST, his Associate and/or Assistant, shall each have the privilege of attending at least four (4) national or international medical and scientific meetings of interest to his specialty, at the expense of the hospital. Cost not to exceed 1/10 of 1% (one-tenth of one percent) of the annual gross income of the Department. Any unused portion of said amount, after a period of one year, shall revert to the hospital; also, any unused portion of said amount shall revert to the hospital upon termination of this contract: and further providing that not more than 1/10 of 1% of said annual gross income shall at any time be accumulated or set aside for said purpose.

7. PATHOLOGIST shall be entitled to make long distance phone calls on HOSPITAL business wherever in the discretion of PATHOLOGIST SAME is desirable and necessary in the welfare of HOSPITAL.

8. HOSPITAL shall purchase such books and manuals for use in the Department as part of HOSPITAL'S obligation to provide supplies and equipment, said books and equipment to remain the property of HOSPITAL.

9. HOSPITAL, presently accredited for two (2) resident pathologists, will assist in all efforts to acquire two (2) residents in preference to two (2) prosecutors; and further, will extend all efforts for approval for a four residency program.

10. PATHOLOGIST and any Assistant and/or associate in the Department will arrange among themselves for their vacations, keeping in mind the needs and demands of HOSPITAL, and of general hospital policy. Pathologist with less than five (5) years service or association with HOSPITAL shall be entitled to two (2) weeks vacation, those with over five (5) years, three (3) weeks vacation and those with over ten (10) years, four (4) weeks vacation.

11. Where PATHOLOGIST, his Associate and/or Assistant, are absent, Pathologist shall have the privilege of working out amongst his staff the division of work and duties in The Department; and the compensation due PATHOLOGIST under this Agreement or due his Associate and/or Assistant shall not be terminated, suspended or decreased as long as PATHOLOGIST or his staff available for duty perform all duties and obligations under this Agreement and provide adequate service as defined in Paragraph 2.

12. The compensation to be paid PATHOLOGIST shall be as follows:

(a) 13-1/2% of the gross income of The Department, plus 50% of outside surgicals.

(b) The division of income between PATHOLOGIST, the contracting party herein, and PATHOLOGIST'S Associate and/or Assistant he has or may hereafter engage, shall be arranged and agreed upon between PATHOLOGIST and said Associate and/or Assistant. When such arrangement is agreed upon HOSPITAL shall be advised and compensation due said Associate and/or Assistant shall be paid directly to said Associate and/or Assistant by HOSPITAL in the same manner and time as HOSPITAL pays PATHOLOGIST, the contracting party herein.

(c) It is agreed PATHOLOGIST AT THIS TIME HAS one (1) Associate and that should the services of the laboratory make the engagement of a third pathologist desirable in the welfare of HOSPITAL, then and in that event, a new contract would be negotiated.

13. HOSPITAL SHALL ALLOW PATHOLOGIST adequate time for trips to various outside hospitals where necessary in connection with outside surgicals.

14. HOSPITAL will bill and collect all fees due for services rendered by PATHOLOGIST and The Department.

15. This Agreement may be amended or altered from time to time by written consent of the parties without affecting the remainder not specifically amended.

16. This Agreement shall be for one (1) year and shall be automatically renewed unless terminated in writing by either party at least sixty (60) days prior to the annual anniversary date.

17. This Agreement shall provide for annual renegotiation of the terms and obligations contained herein. Either party desiring to renegotiate shall notify the other in writing at least one hundred and twenty (120) days prior to the anniversay date. If the period of renegotiation extends beyond the anniversary date, the existing Agreement shall remain in effect on a month-to-month basis.

18. If PATHOLOGIST leaves his position before the termination period he forfeits all rights under this Agreement.

19. HOSPITAL may terminate any time upon the happening of any of the following:

(a) Personal or professional misconduct or breach of this Agreement by PATHOLOGIST of such serious nature as to render PATHOLOGIST'S presence obnoxious to the majority of the Medical Staff.

(b) Conviction of PATHOLOGIST of any crimes punishable as a felony involving moral turpitude.

(c) Absence of PATHOLOGIST for any reason for a period of ninety (90) days.

20. PATHOLOGIST may terminate this Agreement:

(a) At any time by HOSPITAL'S breach of the Agreement in a serious or substantial manner so that PATHOLOGIST'S continued practice in congenial surroundings is impossible or intolerable.

(b) By HOSPITAL'S loss of accreditation by any or more of the various recognized accrediting agencies.

21. It is agreed and understood that PATHOLOGIST'S Associate, under this Agreement and any renegotiation thereof, is and is intended to be DOCTOR MARTHA F. GOSS; that in the event PATHOLOGIST should be-

come unable for any reason to perform his duties and obligations hereunder, and during the agreed absences of PATHOLOGIST, his said Associate shall become Acting Pathologist with all rights, powers, privileges and obligations of PATHOLOGIST, and this Agreement will continue in force as long as PATHOLOGIST or Associate provide proper and adequate service as defined in Paragraph 2, but this provision shall not in anywise affect any power, right or privilege of PATHOLOGIST to terminate the services of Associate or that of Associate to withdraw, except in such event PATHOLOGIST or Associate shall exercise their respective rights and privileges upon due notice to the other in a customary and ethical manner.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed on the ..... day of ....., 19.... and agree that the effective date of this Agreement shall be the ..... day of October, 1961.

St. Joseph Hospital
By /s/ Sister M. Bernardine, O.S.F.
Administrator

/s/ L. C. Prieto, Jr.

AMENDMENT 10

Rights reserved to states or people.—The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Supreme Court, U.S.
FILED
AUG 24 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-136

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

vs.

DR. LUIS C. PRIETO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Dr. Prieto was employed by a hospital as Director of Laboratories and Pathologist in 1956, pursuant to a contract reciting that he "is desirous of entering the employment" of the hospital, and the hospital "agrees" (Exh. 29, p.

196-7a).[1] Plaintiff tacitly admitted that the relationship was one of employment (Brief of Appellant, p. 13). Both Dr. Prieto and the hospital's chief administrative officer testified that the relationship between Prieto and the hospital remained precisely the same throughout his tenure, regardless of any subsequent contract (83a, 154a). Dr. Prieto always considered himself to be an employee (152-3a). The hospital considered him to be an employee, until the *Gault* litigation occurred (Exh. 7; 82a, 85-86a, 95a). At that stage, insurance counsel suddenly decided that a contrary view might prove financially sound (Exh. 9; 88-90a). Even thereafter, the Hospital Administrator testified under oath that Dr. Prieto was an employee (95a).

The technician-tortfeasor was considered by everybody to be the hospital's employee, even after the *Gault* incident (162-3a, 131a, 82-3a; Exh. 7). The Administrator testified at trial:

> "Q. Mr. Luton, the hospital itself, your end of it, the administration and so forth considered Mary Geiger an employee, didn't it? A. Yes Sir." (83a).

The District Court found *as facts* that both Prieto and Geiger were employees of the hospital (A7-8).[2] The Sixth Circuit concurred, as to Prieto, and found it unnecessary to inquire further (A13). The law of Tennessee is clear that an employee is not vicariously liable for a co-employee's torts.

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1. Such page references are to the Joint Appendix below.
2. Such page references are to Petitioner's appendix.

ARGUMENT

I. This Court Reviews Factual Findings Only upon a Very Obvious and Exceptional Showing of Error, Not Present Here.

Petitioner seeks review of factual findings regarding employment status and negligence. The evidence touched on above provides a clear basis for the decision reached below. This Court has clearly expressed the inappropriateness of seeking review of such decisions:

> "The petitioner asks us to reject as 'clearly erroneous' the factual conclusion about his Party membership reached by the District Judge and accepted by the Court of Appeals. In order to do so, we would be forced to disregard this Court's repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.' [Citation omitted.] For there was no 'very obvious and exceptional error' in the conclusion of the two courts below that Petitioner had been a member of the Communist Party. The testimony of Dr. Kury gave a concrete basis for this conclusion, and that of Dr. Halasz lent it support." *Berenyi v. District Director,* 385 U.S. 630 at p. 635.

Petitioner has shown only that the relevant evidence was, at best, conflicting. "When, as here, resolution of the disputed factual issues turns largely on the assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force." *Id.,* at p. 636.

II. Petitioner's Constitutional Issue, Not Raised Below, Is Not Open on Certiorari.

Petitioner's Tenth Amendment claim is directed at the decision of the trial court, as affirmed by the Court

of Appeals. The claim was not presented below. This Court has repeatedly held that such a claim will not be considered. *Ellis* v. *Dixon,* 349 U.S. 458; *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 364 U.S. 137; *Neely* v. *Martin K. Eby Cons. Co.,* 386 U.S. 317, *reh.den.* 386 U.S. 1027.

III. The Decision Below Accords with the Law of Tennessee.

The Tennessee Supreme Court has clearly held that a supervisory employee is responsible to no one for the torts of an underling. *L.&N.R.R.Co.* v. *Sessler,* 63 Tenn. 407, 408-9; *Brown & Sons Lumber Co.* v. *Sessler,* 128 Tenn. 665, 672-3. Such is the general rule. *Regents of State University* v. *Rose,* 45 Mich. 284; 35 *Am.Jur.,* Master and Servant, §103.

Tennessee law is equally clear that "the interpretation given to a contract by the parties themselves, as shown by their acts, will be adopted. [Citations omitted.]" *Tennessee Enamel Mfg. Co.* v. *Stoves, Inc.,* (6th Cir. 1951), 192 F.2d 863, at p. 868, *cert.den.,* 342 U.S. 946. *Accord: McDowell* v. *Rambo,* 21 Tenn.App. 448. Moreover, once an employment relationship is shown to exist (as it clearly did when the hospital initially employed Prieto), the burden is upon the employer to show that the relationship changed to that of independent contractor. *D. M. Rose & Co.* v. *Snyder,* 185 Tenn. 499; *National Life & Acc. Ins. Co.* v. *Morrison,* 179 Tenn. 29; *Welch* v. *Reiling,* 170 Tenn. 698; *Sledge* v. *Hunt,* 157 Tenn. 606. That burden was simply not overcome at trial.

Petitioner's argument (petition, pp. 10-12) from the Tennessee medical practice statutes is wholly unfounded. The single case cited holds that the prohibitory statutes involved apply only to persons, and *not* to corporations.

State, ex rel. Loser v. *Nat'l Optical Stores Co.*, 189 Tenn. 433, at p. 444. It also holds that the activities of the defendant were illegal because specifically made so by a statute applicable solely to optometry. 189 Tenn. at p. 439. Dr. Prieto was a pathologist, not an optometrist.

IV. Lower Court Conclusions of State Law Will Not Be Overturned Unless Shown to Be Wrong.

Petitioner cites a large number of general principles, mostly of limited application to the case in general, and of none to the facts found and accepted below. The cases cited in III, *supra*, provide clear precedents for the decision below. Since Chief Judge Phillips, a Tennessean, was a member of the panel which decided the case below, the following holding of this Court is particularly apt:

> "The questioned ruling was made by three judges who are constantly required to pass upon Illinois law questions. One of the three judges has long been a resident and lawyer of Illinois. Examination of the Illinois state court opinions pressed upon us leaves us unable to say with any degree of certainty that the Court of Appeals' holding was wrong. It is certainly neither novel nor unreasonable for state law to provide that when all trust beneficiaries die, the trust corpus should revert to the donor. It would be wholly unprofitable for us to analyze Illinois cases on the point here urged. It is sufficient for us to say that we think reasonable arguments can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of state laws." *Spiegel's Estate* v. *Com'r of Internal Revenue*, 335 U.S. 701 at p. 708.

Accord: *The M/V "Tungus"* v. *Skovgaard*, 358 U.S. 588, at p. 597 ("We cannot say that its conclusion is clearly wrong. Therefore, despite the inherent uncertainties in-

volved, we will not disturb that court's interpretation of the New Jersey law. Such a course is consistent with the practice that has been followed in the past.") See, also, *MacGregor* v. *State Mut. Life Assur. Co.*, 315 U.S. 280, *reh.den.* 315 U.S. 829; *Helvering* v. *Stuart*, 317 U.S. 154; *Township of Hillsborough* v. *Cromwell*, 326 U.S. 620; *Propper* v. *Clark*, 337 U.S. 472; *Ragan* v. *Merchants Transfer Co.*, 337 U.S. 530; *Bernhardt* v. *Polygraphic Co. of America*, 350 U.S. 198; *General Box Co.* v. *United States* 351 U.S. 159.

CONCLUSION

Respondent respectfully suggests that the decisions of the District Court and of the Court of Appeals were soundly based upon Tennessee law and upon the evidence adduced at trial. The question decided is not of general importance. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF OF THE PETITIONER

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INSURANCE COMPANY OF NORTH AMERICA,
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Respondent.

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

PREFATORY

Having previously included in its Petition the matters[1] required by Rule 23, Petitioner, Insurance Company of North America, submits its Reply Brief in response to Respondent's Brief in Opposition.

1. Except certain statutes inadvertently omitted therefrom and which are included in the Supplemental Appendix at the end of this Reply Brief.

ARGUMENT

All of the Errors Petitioner Asserts Are Properly Reviewable by This Court

(I) Petitioner's Constitutional Claim Is Timely

As set out in its Petition for Certiorari (which also embodies petitioner's main brief), petitioner submits that the courts below have decided important questions of Tennessee law in a way that is in direct and irreconcilable conflict with well-established Tennessee law and public policy, and in doing so have denied petitioner rights secured by the 10th Amendment. *Erie* v. *Tompkins*, 304 U.S. 64 (1938).

Respondent has objected that the Constitutional claim comes too late because it was raised for the first time in this court.

We respectfully submit that the claim is timely.

This Court has long-recognized that upon Petition for Writ of Certiorari questions involving basic constitutional rights may be raised for the first time in this court. *Ford Motor Co.* v. *Treasury Dept.*, 323 U.S. 459, 467 (1945). There this court said:

> "The objection to petitioner's suit as a violation of the Eleventh Amendment was first made and argued by Indiana in this Court. This was in time, however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court."

The cases respondent cites to the contrary are not in point. Only one (*Ellis* v. *Dixon*, 349 U.S. 458) involved a constitutional issue; and there the pleadings were held to be "too amorphous to permit adjudication" and the record as "vague and empty". It was dismissed on the insufficiency of the pleadings in the state court in which it originated. It is simply inapplicable. In *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, which originated before the Federal Power Commission, the applicable statute provided that: "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. . . ." There was no constitutional issue involved. Here there is no such statute involved, and a constitutional issue is involved. In *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, reh. den. 386 U.S. 1027, petitioner raised an issue (concerning the trial court's exclusion of testimony) for the first time, in a short passage at the end of her **brief** in this Court. She did not raise it in her petition, nor was it a constitutional issue.

It should also be noted that in the instant case, all of the nine (9) grounds upon which Petitioner claims that the lower courts' decisions are contrary to the well-established Tennessee law, were raised and argued in both courts below as well as in the Petition to this Court.

(II) This Court Has Not Hesitated to Undertake Independent Examination of Factual Issues When a Constitutional Claim Depends on Their Resolution

Although respondent relies on *Berenyi* v. *District Director*, 385 U.S. 630 (1967), he fails to point out the long-standing policy of the Court as stated therein:

> "To be sure this Court has not hesitated to undertake independent examination of factual issues when consti-

tutional claims may depend on their resolution. . . ." (385 U.S. at p. 636, citations omitted)

(III) (a) Where a Finding of an Ultimate Fact Involves the Application of Legal Principles, It Is Subject to Review;

(b) Mixed Findings, Conclusions and Ultimate Findings Are Not Subject to the "Clearly Erroneous" Standard

The foregoing principles are set out in *Baumgartner* v. *United States*, 322 U.S. 665 (1944). *United States* v. *Mississippi Valley Generating Corp.*, 364 U.S. 520 (1961); *Bogardus* v. *Commissioner*, 302 U.S. 34 (1937); *Weible* v. *United States*, 244 F.2d 158 (9 Cir. 1957); *Chandler* v. *United States*, 226 F.2d 403 (7 Cir. 1955); *Cordovan Associates* v. *Dayton Rubber Co.*, 290 F.2d 858 (6 Cir. 1961).

(IV) The Ultimate Findings and Conclusions That Dr. Prieto Was a Mere Employee of the Hospital Rather Than an Independent Contractor, and That the Technician Was Not the Loaned Servant of Dr. Prieto, and That Dr. Prieto Was Not Liable to the Hospital, Are Not Findings of Fact

They are **mixed** findings of fact and conclusions of law. Those **ultimate** findings and conclusions **involved the application of legal principles** that have to do with Tennessee law concerning (a) **non-delegable contractual duty,** (b) **the public policy of the state,** (c) **the construction of written contracts,** (d) **the Tennessee loaned servant doctrine,** (e) **the right of control of a master over the manner of a servant's performance of duty,** (f) **the difference between the master-servant relationship and an independent contractor relationship,** (g) **indemnity,** and (h) **contribution.** Thus they are properly reviewable by this Court.

Moreover, **the District Judge's ultimate conclusions of law are inconsistent with his determinative findings of fact in the following three instances.**

(1) The District Judge **correctly** found that:

> *". . . Dr. Prieto had ultimate responsibility for the professional work done in the department, including the work done by Mrs. Geiger [the technician]. . . ."* (Memorandum Decision, App. A6-A7, emphasis supplied),

yet he failed to enforce Dr. Prieto's ultimate responsibility.

(2) He **correctly** found that:

> *It is true that, as stated, while it was not actually necessary for him [Dr. Prieto] to regularly supervise her [the technician] in such work, he had the authority to do so."* (Memorandum Decision, App. A7, emphasis supplied),

yet he ignored the Tennessee law of master and servant and of loaned servant and failed to hold the technician to be Dr. Prieto's loan servant for whose negligence he would be responsible.

(3) He **correctly** found that:

> *". . . the Hospital administration had no authority to control the manner in which he [Dr. Prieto] carried out strictly professional duties. . . ."* (Memorandum Decision, App. A8, emphasis supplied),

yet he ignored the Tennessee law governing the relationship of independent contractor and held Dr. Prieto to be the mere servant of the hospital rather than an independent contractor.

(V) The Decisions Below Do Not "Accord with the Tennessee Law"

It is undisputed that under Tennessee law **the distinguishing mark which differentiates the relationship of**

master and servant from that of employer and independent contractor is the right of control over the manner of performance of the work in question, and that other factors are looked to only to aid in determining whether such right existed in a given case. *D. M. Rose & Co.* v. *Snyder,* 185 Tenn. 499, 514, 206 SW2d 897, 904 (Sup. Ct. 1947); *Conasauga River Lumber Co.* v. *Wade,* 221 F.2d 312, 315 (6 Cir. 1955), cert. den. 350 U.S. 949 (1956); *Jarratt* v. *Clinton,* 34 Tenn. App. 670, 677, 241 SW2d 941, 944, cert. den. Sup. Ct. Tenn. (1951).

Yet both courts below ignored that principle and held Dr. Prieto to be the mere servant of the hospital **in the face of the District Court's own finding that the hospital had no authority to control the manner in which the doctor performed his professional duties.**

This is not a mere error of fact. Nor is it a harmless error in the court's interpretation of state law. It is a clearly erroneous, prejudicial failure to apply an undisputed principle of applicable state law to an undisputed fact.

The same is true of the failure of both courts below to apply the same legal principle to Dr. Prieto's relationship with his technician.

The District Court **correctly** found that **Dr. Prieto had the authority to control her work as a cytologist.** Yet the District Court **failed to hold him the responsible master,** ignoring the Tennessee rule that: "Whenever the defendant has had such right of control, irrespective of whether he exercised it or not, he has been held to be the **responsible master.**" *D. M. Rose* v. *Snyder, supra,* at 206 SW2d 904, and *Conasauga River Lumber Co.* v. *Wade, supra,* at 315 (emphasis supplied).

It should be noted the respondent has not denied any of the foregoing. Instead he has replied that a supervisory employee is not responsible for the torts of his underling.

The answer to respondent's contention is set out in our Petition (Reason No. 1 for Granting Writ), in that (a) having bound himself contractually to the hospital to see that this test is done, and having then delegated this performance to the technician, Dr. Prieto became **absolutely responsible** to the hospital for the manner of its performance just as though he himself performed it. *Dickson* v. *Blacker,* 194 Tenn. 504, 508, 253 SW2d 728, 730 (Sup. Ct. Tenn. 1952), *Pullman Palace Car Co.* v. *Gavin,* 93 Tenn. 53, 58, 23 SW 70, 71 (1893), *Roths Central Garage* v. *Holmes,* 10 Tenn. App. 500, cert. den. Sup. Ct. Tenr (1930) and (b) the District Court itself correctly found that:

> ". . . Dr. Prieto had ultimate responsibility for the professional work done in the department, including the work done by Mrs. Geiger as a cytologist. . . ." (App. A6-A7)

If the 6th Circuit's Per Curiam is construed as a concurrent finding of fact so as to invoke the "Two Court" rule, then the Supreme Court is bound by the foregoing, and is bound to give effect to Dr. Prieto's "ultimate responsibility" for the technician's negligence.

If on the other hand the 6th Circuit's Per Curiam is not to be construed as a concurrent finding of fact, there is still another reason for this Court to examine independently the issues, both factual and legal.

(VI) In Addition to the Nine Errors of Law Cited in the Petition, Two (2) of the District Court's Subsidiary but Pivotal Findings of Fact Were Clearly Erroneous. (These Two Pivotal Facts Related to Judge Brown's Ultimate Conclusion That Dr. Prieto Was the Hospital's Employee Rather Than an Independent Contractor.)

The first was:

(1) **"The Hospital Deducted from Dr. Prieto's Compensation for Federal Income Tax. . . ."** (Memorandum Decision, App. A7)

This is clearly erroneous. **The undisputed fact is that no income tax was withheld from his compensation.** His W-2 Form for 1964 (the year of the injury) was introduced as Exhibit 2 and was also printed in the Appendix in the 6th Circuit at page 181a.[2] **His W-2 Form clearly shows that no income tax was withheld.** In addition, the testimony is that no income tax was withheld from his compensation.

The Hospital Administrator testified:

"Q. Now, let's take Dr. Prieto's compensation. Was any **Federal Income Tax** withheld from his compensation? A. **No, Sir."** (60a)[3]

This testimony occurred immediately prior to the following which may furnish a clue to the reason for the District Court's error. But for whatever reason, it clearly was error.

"Q. Now, with regard to the pension plan, state—first of all, does the hospital or did the hospital at that time have a pension plan? A. Yes, Sir.

"Q. Was Mrs. Geiger included under that or not? A. Yes, Sir.

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2. Such citations are to the Joint Appendix below.

3. *Ibid.*

"Q. Was Dr. Prieto included under that or not? A. No, Sir.

THE COURT: What about social security? Did (18) you take social security out of Mrs. Geiger's money?

"THE WITNESS: Yes, Sir.

"THE COURT: What about Dr. Prieto?

"THE WITNESS: There was social security paid. I don't know whether it is still done on Dr. Prieto or not. But I believe this particular year there was social security deducted from Dr. Prieto, and he reimbursed the hospital for their share of it, Judge.

"THE COURT: He reimbursed the hospital for that part which the hospital contributed?

"THE WITNESS: Right.

"BY MR. ALLEN:

"Q. So it was withheld, but then he reimbursed it? A. Right. I think that was Dr. Prieto's request if I remember correctly." (p. 60a)[4]

The **second** clearly erroneous purely factual finding was:

> **(2) ". . . he [Dr. Prieto] Initially Worked under Substantially Similar Conditions Without a Written Contract."** (Memorandum Decision, A8)

To the contrary, the **undisputed proof** is that when he initially began work at this hospital in 1956 he had a written contract which expressly labeled him an "employee", and that **by his own testimony** he negotiated the 1961 contract **thereby terminating his 1956 contract,** in order **"to be more attuned to what my colleagues were doing . . . at the time they were proposing more of an independent contractor system. . . ."** (160a, 166a, emphasis supplied)[5]

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4. *Ibid.*

5. *Ibid.*

Both contracts are exhibits and are reproduced in the Appendix in the 6th Circuit.. **A comparison of their provisions leaves no doubt that Dr. Prieto's intention and the hospital's, by his 1961 contract, was to confer on him the status of an independent contractor, de jure, in conformity with the de facto status he already enjoyed by actual practice.**

(VII) The Effect of the Decisions of the Courts Below Is to Construe the 1961 Written Contract Between the Doctor and the Hospital Contrary to the Public Policy of Tennessee

The only reply respondent has made to this proposition is that (a) the medical practice statutes upon which we rely apply only to persons and **not** to corporations and that (b) the statute in the *Loser* case (*State ex rel. Loser* v. *Nat'l Optical Stores Co.*, 189 Tenn. 433, 255 SW2d 263, Sup. Ct. 1949) applies only to the practice of optometry rather than medicine. Point (a) is, however, the very point we make, namely, that the Tennessee medical practice statutes governing eligibility to practice medicine limit such eligibility to individuals, as said in *Loser*, *supra*:

> "A corporation can neither practice law nor his lawyer to carry on the business of practicing law for it *any more than it can practice medicine or dentistry by hiring doctors or dentists to act for it*. . . .
>
> "The rule is uniform that a corporation cannot practice one of the learned professions . . . and obviously this implies that a corporation cannot employ a licensed practitioner since a corporation acts only through agents. . . .
>
> ". . . the contract of employment of the doctors was illegal and against the public policy or public welfare. . . ." (189 Tenn. at 444 and 447, 225 SW2d at 268-269, citations omitted, emphasis not supplied.)

True, the statutes in *Loser, supra,* apply only to the practice of optometry, but the State Supreme Court painted with a very broad brush reviewing 19 Tennessee cases and 14 other authorities.

In view of the rules of this Court, we reproduce the medical practice statutes of Tennessee upon which we rely in a supplemental appendix under the same cover herewith. We reiterate our position that the lower courts' decisions have the effect of construing the 1961 contract (in effect on the date involved) contrary to the public policy of the State of Tennessee, and this is one of the ten reasons for granting the Petition for Writ of Certiorari as set out therein.

* * *

Since respondent has not denied our assertion that the evidence and law is that Dr. Prieto was himself negligent and that the District Court erred as a matter of law in holding that evidence of custom was necessary to make a case of his negligence, and that the Sixth Circuit erroneously pretermitted those questions, we simply reiterate our arguments made in the petition (pp. 20-21) concerning the issues as to the doctor's negligence.

Dr. Prieto, being negligent, would be responsible to the hospital for his own negligence even if he were not responsible for his technician's negligence. Thus, he would be liable for contribution, even if not liable for indemnity.

CONCLUSION

Petitioner reiterates that the petition should be granted for one, more or all of the ten reasons originally set out therein. If the Federal Courts are at liberty to ignore, in a diversity case, controlling state law to the extent and

in the manner as in this case, the protection of the 10th Amendment, the mandate of *Erie* v. *Tompkins, supra,* and the right of petition to this Court would all, in fact, be meaningless.

Granting certiorari may be the exception rather than the rule in diversity cases, but surely this case should be the exception.

RELIEF SOUGHT

The relief sought is:

(1) Reversal of the District Court and Court of Appeals for the Sixth Circuit, and entry of judgment against respondent for indemnity of petitioner in the same sum as rendered in the District Court against the technician, $200,743.47 plus interest at the legal rate from July 24, 1970 and all costs.

(2) Or in the alternative, the entry of judgment for contribution in the sum of 1/2 of said sum, plus interest and costs.

(3) Or in the alternative, reversal of the District Court and the Court of Appeals for the Sixth Circuit and remand to the said Court of Appeals for further proceedings in accordance with the opinion of this Court.

Respectfully Submitted,

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SUPPLEMENTAL APPENDIX OF LAW

The following statutes of the State of Tennessee are relied upon by Petitioner and are specifically quoted from *Tennessee Code Annotated* as follows:

"53-1306. *Practice in healing arts or medicine by partnership, person, association, or corporation unauthorized.*—Nothing in this chapter shall authorize any person, partnership, association, corporation, or any state, county, or local governmental unit, or any division, department, board or agency thereof, to engage, in any manner, in the practice of the healing arts, or the practice of medicine, as defined by law. [Acts 1947, ch. 13, §7; C. Supp. 1950, §5879.6 (Williams, §4432.7).]"

"63-202. *'Healing arts' defined.*—For the purpose of this chapter, any license authorizing the licensee to offer or undertake to diagnose, treat, operate on, or prescribe for any human pain, injury, disease, deformity, or physical or mental condition is a license to practice the healing art. [Acts 1943, ch. 92, §2; C. Supp. 1950, §6917.3 (Williams, §6917.2).]"

"63-203. *Certificate of ability required for examination in healing arts.*—No person shall be eligible for examination or permitted to take an examination for a license to practice the healing arts or any branch thereof, or be granted any such license, unless he has presented to the licensing board, or officer empowered to issue such a license, a certificate of ability in anatomy, physiology, chemistry, bacteriology, and pathology (hereinafter referred to as the basic sciences), issued by the state board of examiners in the basic sciences. [Acts 1943, ch. 92, §1; C. Supp. 1950, §6917.2 (Williams, §6917.1).]"

"63-216. *Violations and unauthorized practice.*—Any person who shall practice the healing arts or any

branch thereof without having obtained a valid basic science certificate from the board, except as otherwise authorized in this chapter, or who shall obtain or attempt to obtain a basic science certificate by any dishonest or fraudulent means, or who shall forge, counterfeit, or fraudulently alter any such certificate, or who shall obtain or attempt to obtain a license to practice the healing arts or any branch thereof from any board authorized to issue any such license without presenting to said licensing board a valid certificate issued by the board of examiners in the basic sciences as in this chapter required, or who knowingly issues or is a party to the issuance of a license to practice the healing arts or any branch thereof to any person not presenting a valid certificate or shall violate any of the provisions of this chapter shall be guilty of a misdemeanor and shall be punished in accordance with the law. And each day that any person shall practice the healing arts or any branch thereof without first obtaining a valid certificate shall constitute a separate offense. [Acts 1943, ch. 92, §17; C. Supp. 1950, §6917.17.]"

"63-605. *License required to practice.*—No person shall practice medicine in any of its departments within this state unless and until such person shall have obtained a certificate of fitness from the state board of medical examiners, created by §63-601, and shall have obtained a license and a certificate of registration from the state licensing board for the healing arts as provided in chapter 1 of this title; provided, however, that the provisions in this chapter with reference to obtaining a certificate of fitness from the state board of medical examiners shall not apply to any person who on July 1st, 1947, was duly and regularly licensed by law to practice medicine in any of its branches in this state. [Acts 1901, ch. 78, §1; 1905, ch. 111, §1; Shan., §3609a13; Code 1932, §6918; impl. am. Acts 1947, ch. 9, §§2-4, 9; mod. C. Supp. 1950, §6918.]"

"63-608. *'Practice of medicine' defined.*—Any person shall be regarded as practicing medicine within the meaning of this chapter who shall treat, or profess to treat, operate on, or prescribe for any physical ailment or any physical injury to or deformity of another provided; that nothing in this section shall be construed to apply to the administration of domestic or family remedies in cases of emergency, or to the laws regulating the practice of dentistry; and this chapter shall not apply to surgeons of the United States army, navy, air force, or marine hospital service, or to any registered physician or surgeon of other states when called in consultation by a registered physician of this state, or to midwives, or to veterinary surgeons, or to osteopaths, or chiropractors not giving or using medicine in their practice, or to opticians, optometrists, chiropodists or to Christian Scientists. [Acts 1901, ch. 78, §19; Shan. §3609a33; mod. Code 1932, §6937; Acts 1945, ch. 181, §10; impl. am. Acts 1947, ch. 2, §§1, 2; C. Supp. 1950, §6937; modified.]"